(17)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 181

AARON ROTH,

Petitioner,

vs.

LOCAL No. 1460 OF RETAIL CLERKS UNION, RETAIL CLERKS INTERNATIONAL PROTECTIVE ASSOCIATION, THOMAS DAY, and VERNON HOUSEWRIGHT,

Respondents.

REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI.

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The petition for certiorari embodies within itself a supporting brief. Respondents have filed a brief in opposition, to which petitioner makes this reply:

STATEMENT OF MATTER INVOLVED.

Respondents' brief does not deny:

(1) That petitioner's recital of the uncontradicted evidence at pages 11-18 of the petition is correct.

(2) That respondents' answer (R. 7) tendered *no issue* about petitioner being guilty of coercing his employees to resign from the union; and that Indiana law forbids any State Court, including the Supreme Court, to decide a case on an issue not pleaded, which the Supreme Court actually did. (See petition, 21, top.)

(3) That the Indiana Supreme Court's decision in the first appeal of this case (216 Ind. 363) lays down a construction of the Indiana labor injunction statute, which has never since been modified. (Petition, 27.)

(4) That the Indiana Supreme Court has denied petitioner his rights under said statute as thus construed, on the alleged ground that he is guilty of coercing his employees to resign from the union, and except for this alleged guilt he would be entitled to the protection of said statute as construed in the first appeal, the same as other Indiana citizens.

(5) That the last opinion compels petitioner to become a law-breaker and to join the union in violating the law laid down in the first appeal, in order to prevent certain destruction of his business and property rights.

Respondents' brief, like the opinion appealed from, camouflages the simple, stark charges of the petition by detailing facts which are either immaterial or false, to-wit:

(1) That petitioner is a member of a grocers association (Brief, 2).

Respondents' answer tenders no issue on this subject nor asserts any grievance or rights

against petitioner on account of such membership. (R. 7.) Nor do any of the three opinions base the decision on this fact, or so much as refer to it. (R. 18, 41, 117.) The Indiana statute, like its prototype, the Norris-LaGuardia Act, expressly confers on employers the right of such membership.

> Section 40-504(b), Burns Indiana Statutes of 1933.

(2) That petitioner refused to sign the contract because he had given his word to his association not to do so (Brief, 2).

This, like the charge in Paragraph (1) above, is neither pleaded in respondents' answer (R. 7), nor referred to in any of the three opinions. (R. 18, 41, 117.) On the contrary, the first opinion holds that he *ought* to refuse to become a party to the union's unlawful scheme of coercing his employees. If a man refuses to do an unlawful thing, he is in the right, regardless of what motives prompted his refusal.

(3) That the picketing was "free from *fraud*, violence or *any unlawful conduct.*" (Brief, 2, bottom.)

The picketing made *false representations* to the public, as expressly found in Finding No. 1 (R. 48, top), and as clearly indicated by comparison of the "unfair" label applied to plaintiff, with the following undisputed facts: that his labor standards were superior to the Union's and superior to the community standard, that respondents asserted no grievance against him, except that he refused to sign, and that the sole

object of the picketing was to compel the signature of a contract to coerce employees contrary to Indiana law. (R. 74, 75, 76, 82, 89, and 113.)

(4) That petitioner "*caused to be prepared* a written resignation * * * accompanied with a request that his clerks *read* the same." (Brief, 2.)

There is no evidence that petitioner prepared the resignation, or who prepared it, or that he said anything to his clerks about reading it. The evidence is merely that he handed this paper to Dorothy Carlson, after having already *told all the clerks to do as they pleased about the union*, and the clerks thereafter acted entirely on their own volition and welcomed the document as a desired means of escape from coercive membership which they had already repudiated by word and deed. (See summary of evidence in petition, 11-17).

This case does not turn upon any such trivial details as above listed, which respondents emphasized in the opening pages of their brief. It turns upon the grave charge that the Indiana Supreme Court has *discriminated* against petitioner, and excluded him from the equal protection of Indiana law on the *fictitious* ground that he is guilty of coercing his employees to resign from the union, and hence is beyond the pale of the law.

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is invoked on the clear charges stated in the preceding paragraph, and respondents' brief admits at page 7 that jurisdiction can be invoked on such a ground.

But respondents then go on to make a false statement of what petitioner *claims*. They say at the bottom of page 7 that he bases his constitutional right on the ground that "none of his employees were *members* of the union *at the time the picketing began.*" (Brief 7, bottom; 8, bottom.) The utter falsity of this statement of petitioner's claim is demonstrated by referring to pages 7-11 of the petition.

While the main excuse offered in the last two opinions, and also in respondents' brief, for denying petitioner relief, is that he was guilty of employee-coercion, there is also woven into this theme a secondary one about the employees having been members "at the time the picketing *began.*" The undisputed evidence is that whatever membership then existed was a *coercive* one, which the employees had already repudiated by word and deed as fully as they knew how, before the picketing began on the morning of May 17, 1939; after which on the afternoon of the same day they signed a formal written resignation and sent it by registered mail to the Union, which received it the next day on May 18. (R. 93, 94.) Respondents cannot derive any benefit from this former coercive membership unless the court is prepared to let them profit from their own wrong. Moreover, in their answer they asserted no such profit, nor made any contention that their rights were enlarged by this former membership. (R. 7.)

What the Facts Were When Petitioner Filed His Suit.

But the *status had crystallized*—all of the above facts had occurred, including delivery of the formal resignation,—*before* petitioner filed his suit for temporary and permanent injunction on May 18, 1939. (R. 4.) His right to maintain the suit depended upon the status of the parties *then* existing—not on some closed chapter of the story. (Otherwise, if picketing started lawful in character, it never could be enjoined at a later stage, even if it turned unlawful.) Moreover, respondents' answer filed four days after the suit was begun, admits "that plaintiff's employees have no labor organization of their own and *are wholly unorganized.*" (R. 7, 8, top.) Further, respondent Housewright testified that the sole object of the picketing was to compel the signature of the contract whereby petitioner would be obliged to coerce these employees to re-join the union. (R. 113, top; R. 96.)

Apparently the reason for all this straining in the second opinion and in respondents' brief to emphasize the union *membership* of these employees is an attempt to bring this case within the rule of *Scofes* v. *Helmar*, 205 Ind. 596. But that case has no bearing on ours because:

1. The Indiana Supreme Court ignored the *Scofes* case in its first opinion, 216 Ind. 363, (though that case was cited and urged by respondents).
2. In the *Scofes* case two union employees *struck* when the picketing began (205 Ind. at p. 598, middle). They struck to enforce maintenance of union standards (p. 600, top). But in our case, all employees refused to strike, the employer's standards were superior to the union's, and the object was solely to coerce the employees.

3. The *Scofes* case was decided under the old common law of Indiana, before the Indiana labor injunction statute was passed.

4. This statute, as construed in the first opinion, (216 Ind. 363), supersedes the common law and all earlier cases to the extent of conflict (if any). This construction is that a union cannot coerce an employee into joining (or re-joining) and cannot force the employer to be a tool in this unlawful enterprise.

QUESTIONS PRESENTED.

Under this heading respondents repeat the false statement that petitioner "caused" the resignation to be prepared (Brief, 10), without citing any record to sustain it. (However, the identity of the draftsman is a sham issue, in view of the uncontradicted testimony of the employees that they were not influenced by this consideration, and in view of the fact that this is still a free country where employers and employees are still permitted to communicate with each other, and where harassed employees are entitled to obtain a *desired* form of resignation from any draftsman.)

None of the three questions listed by respondents are presented by our petition, namely:

(1) Is the union's demand lawful under the Indiana statute?

That statute was construed by the Indiana Supreme Court in the first opinion (216 Ind. 363), as that court had a right to do, even though its interpretation be different than what the

Supreme Court of the United States might have placed on a similar statute.

Senn v. *Tile Layer's etc. Union*, 301 U. S. 468, 477; 57 S. Ct. 857, 861.

Detroit etc. R. Co. v. *Fletcher Paper Co.*, 248 U. S. 30; 39 S. Ct. 13.

This power to interpret state statutes is absolute in the state court unless the statute, as construed, violates the Federal Constitution. Respondents can hardly argue that the Constitution is violated by a statute preventing them from *coercing* unwilling workers into their union. There is no constitutional guaranty of the *right of coercion*, particularly in view of the recent decisions of this Court cited at page 28 of the petition. Hence, no question of statutory construction is presented to this Court.

(2) "Can the State of Indiana exclude workingmen from peacefully exercising the right of free communication?"

This likewise is a false issue. The statute as construed in the first opinion does not forbid free speech but forbids union *coercion* of workers under the *pretext* of free speech. Such a statute is constitutional. (See cases at page 28 of petition.)

But no "free speech" question is presented by this record, because:

(a) The record is bare of any evidence that the *object* of the picketing is to advertise or communicate anything to anybody.

(b) Respondent Housewright testified that the *sole object* was to *coerce* signing the unlawful contract. (R. 113, 96.)

(c) The second and third opinions do not deny petitioner relief on the ground of "free speech," but upon the false pretext that he is a law-breaker.

(3) "Is petitioner entitled to injunctive relief, under the Act, *when he is guilty* of interfering, aiding and encouraging his employees to sever their connections with the respondent Union?"

This begs the question. The primary question is: Did the Indiana Supreme Court falsely accuse him of guilt, and thereby exclude him from equal protection of the law? The secondary question is: Even if he were guilty, could the court deny him and his property protection, thereby imposing limitless loss regardless of the triviality of the offense, and thereby encouraging him to turn law-breaker in order to obtain relief?

REASONS FOR ALLOWANCE OF WRIT.

The *utter falseness* and preposterousness of the Indiana Supreme Court's accusations against petitioner is emphasized (1) by respondents' failure to deny the correctness of our summary of evidence at pages 11-19 of the petition, and (2) respondents' total failure to cite any record to support the accusation.

That is the question presented. It is stark and fundamental,—a citizen denied protection of law and his property destroyed on a sham pretext, by the state. Such a petition deserves careful investigation by this Court. All that is required at this stage is for petitioner to make a *prima facie* showing. He has done far more than that.

Labor questions will arise in this case only secondarily, if at all. The Indiana statute as construed in the first opinion has every appearance of being valid; but even if it were invalid, the state could not exclude petitioner from its protection on a false pretext, while leaving the statute in operation for the benefit of other citizens. This basic question must not be obscured by the alleged labor questions set forth in respondents' brief.

Therefore, it is respectfully submitted that the petition should be granted.

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Attorney for Petitioner.